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In The

Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

CPC INTERNATIONAL, INC., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE STATES OF MINNESOTA, ALASKA, ARIZONA, ARKANSAS, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MONTANA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY

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STATEMENT OF INTEREST

The amici curiae states (Amici States), through their attorneys general, respectfully submit this brief in support of Respondent Michigan Department of Environmental Quality. Amici States support reversal of the decision of the Sixth Circuit Court of Appeals holding that, where a release occurs from a subsidiary's facility, a parent corporation is not liable as an "operator" for cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601 *et seq.* (1994) (CERCLA), unless liability can be imposed under the common law doctrine of piercing the corporate veil.

Amici States have a strong interest in the implementation of CERCLA and the scope and interpretation of CERCLA's liability provisions. Protection of public health and the environment from the polluting effects of uncontrolled releases of hazardous substances is a responsibility of federal and state government. States play a major administrative and financial role in responding to releases within their borders. The principal federal law on this subject is CERCLA. In addition, most of the states have enacted their own cleanup laws, which generally mirror the elements of CERCLA, including imposing liability for cleanup costs on a broad spectrum of persons connected to the releases.

States rely on both federal and state cleanup laws in carrying out their cleanup responsibilities, and especially in recovering state cleanup costs from those legally responsible for the releases. By directly affecting the application and interpretation of CERCLA, and indirectly

affecting parallel state cleanup laws, federal court interpretations of CERCLA's liability and cost recovery provisions have important legal, financial and practical implications for states. Thus, states have a very important interest in an interpretation of the CERCLA liability provisions that enhances and preserves the vitality of CERCLA's cost recovery remedy. The Sixth Circuit's unduly narrow approach to construction of CERCLA's liability provisions is at odds with the language and purposes of the statute and threatens the vitality of CERCLA's cost recovery remedy, which is critical to the success of the national effort to clean up hazardous waste releases.

SUMMARY OF ARGUMENT

This case involves interpretation of the operator liability provisions of CERCLA and application of those provisions to a parent corporation that actively participates in the management of a subsidiary whose facility is the source of a release. The scope of interpretation given to CERCLA's liability provisions may significantly affect the financial and administrative obligations of states in addressing cleanup of releases. Amici States urge the Court to adopt a broad interpretation of the CERCLA liability provisions that is consistent with the text and purposes of the statute, and that is followed by the majority of the courts of appeals that have decided this question.

The term "operator" is not separately and expressly defined in CERCLA. Interpreting "operator" under CERCLA to include any person who actively participates

in the management of a business or other entity where a release occurs is in accord with the ordinary and natural meaning of the word "operator," with implications about the meaning of "operator" that can be discovered in the text of CERCLA, and with the larger context of the CERCLA liability provisions, which are based on many broadly defined terms.

Applying CERCLA cost recovery liability to a parent corporation whose actions make it an "operator," as broadly and properly construed under CERCLA, advances the underlying purpose of the statute to assure that responsible persons, rather than the public, should bear the cost of cleanup. The correctness of this interpretation and the resulting rule of liability is confirmed by the broad remedial purpose of CERCLA. That remedial purpose is found in the statute's general goal of protecting public health and the environment. It is further reflected in the more specific goals of remedying the effects of past releases of hazardous substances, and creating new statutory remedies to assign liability for cleanup.

ARGUMENT

I. AN UNDULY NARROW JUDICIAL INTERPRETATION OF THE CERCLA LIABILITY PROVISIONS WILL IMPOSE GREATER ADMINISTRATIVE AND FINANCIAL BURDENS ON STATES.

Judicial interpretations of CERCLA that unduly narrow the scope of statutory cleanup liability not only undermine the clear purpose of the statute that those

responsible for hazardous substance releases should bear the burden of cleanup costs, but also significantly affect states by shifting cleanup costs and responsibilities from responsible persons to states and their taxpayers. Uncontrolled releases of hazardous substances pose a massive environmental problem, causing pollution of the nation's air, land, and water, and threatening the health of its citizens. CERCLA, together with state cleanup laws, provides the legal framework for states to respond to this problem.

CERCLA provides powerful legal authorities to the President to select, enforce and oversee response actions to address the highest priority releases throughout the country. *See* 42 U.S.C. §§ 9604, 9605, 9606 (1994). CERCLA also provides a federal source of public funding for cleanups (the "Superfund" for which the cleanup program is named), and provides a broad system of statutory liability by which cleanup costs incurred by the federal government and by states can be recovered from those responsible for the release. *See* 42 U.S.C. § 9607 (1994), *amended by* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 2502(a), 110 Stat. 3004-462 to 3004-464 (1996); and 42 U.S.C. § 9611 (1994).

CERCLA includes an important role for the states in implementating and funding cleanups under the federal Superfund program. Under cooperative agreements with the United States Environmental Protection Agency (EPA), states may take many of the response actions which the President is authorized to take under CERCLA. *See* 42 U.S.C. § 9604(d) (1994). By 1991, all fifty states had entered into some type of cooperative agreement to take actions authorized under CERCLA, effectively creating a

partnership between states and the federal government to address the national cleanup problem. Office of Emergency and Remedial Response, United States Environmental Protection Agency, *An Analysis of State Superfund Programs: 50-State Study*, 1991 Update, Pub. No. 9375.6-08B (1991), Table V-6, 75-77 (*EPA 50-State Study*).

States also must agree to shoulder significant financial and administrative obligations before EPA can take federally-funded remedial actions. Specifically, states must agree to assure payment of 10 percent of remedial construction cost and assure performance of all operation and maintenance. 42 U.S.C. § 9604(c)(3) (1994). Because federally-funded cleanups address the most seriously contaminated sites in the nation – those listed on the National Priority List under 42 U.S.C. § 9605(a)(8)(B) (1994) – these cleanups are often very expensive and complex. Thus, the state share of remedial cost and the administrative obligations for operation and maintenance of federally-funded cleanups can be substantial. An unduly narrow interpretation of the scope of CERCLA cleanup liability will shift a greater share of the financial and administrative burdens of cleanup from responsible persons to the states.

The legal framework for responding to hazardous substance releases also includes state cleanup laws enacted by at least thirty-six states to authorize state participation in the federal cleanup program and to empower states to respond to sites not listed as the highest national priorities for cleanup. *See* Robert B. McKinstry, Jr., *The Role of State "Little Superfunds" In Allocation and Indemnity Actions Under the Comprehensive Environmental Response, Compensation and Liability Act*, Vill. Envtl.

L. J. 83, 84-85 n.3 (1994). Most of these state cleanup laws are similar to CERCLA in their key provisions relating to liability, enforcement and funding. *See McKinstry, supra,* at 85; and *EPA 50-State Study, supra,* at 32-33. States incurring costs for federal and state cleanups may use CERCLA as their principal legal basis for recovery, as a supplement to state liability laws or, by citing CERCLA case law, as authority to support interpretation of comparable state liability laws. Thus, any judicial holding that construes CERCLA liability too narrowly may diminish the ability of states to recover state cleanup costs under CERCLA and under state laws patterned after CERCLA. In both cases, states rather than responsible parties will end up bearing more of the cleanup costs and responsibilities, and some hazardous substance releases may go unremedied.

II. THE LANGUAGE, STRUCTURE AND PURPOSES OF CERCLA SUPPORT IMPOSITION OF OPERATOR LIABILITY ON PARENT CORPORATIONS THAT ACTUALLY PARTICIPATE IN THE MANAGEMENT OF THEIR SUBSIDIARIES.

The central question in this case is who is an "operator" under CERCLA and, more specifically, whether and under what circumstances a parent corporation may be considered an "operator" and therefore liable for the cost of remedying a release from a subsidiary's facility. The Sixth Circuit decided this question erroneously. The Amici States urge the Court to approve the rule adopted by the majority of the courts of appeals that have decided this question: that a parent corporation is liable for cleanup costs as an operator under CERCLA when it

exercises actual control or actively participates in the management of its subsidiary whose facility is the source of a release. For the reasons given below, this rule of operator liability under CERCLA best comports with the text and structure of the statute, the underlying policies which the statute embodies, and the overall remedial purpose of CERCLA.

A. A Broad Interpretation Of "Operator" That Includes A Parent Corporation That Participates In The Management Of A Subsidiary Is Consistent With The Text And Structure of CERCLA.

The language and structure of CERCLA show that key terms used by the statute, particularly the words used to describe the problems to be remedied and those who may be held liable for cleanup costs, are intended to be construed broadly. CERCLA imposes liability for the costs of removal or remedial action which are incurred to address a release of a hazardous substance from a facility. 42 U.S.C. § 9607(a) (1994). Each of the key terms, "release," "hazardous substance," and "facility," along with other important terms used in the CERCLA liability provisions, are very broadly defined in CERCLA. 42 U.S.C. § 9601 (1994), *amended by* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 2502(b), 110 Stat. 3009-464 to 3009-467 (1996).

For example, "release" includes a wide range of active and passive methods by which polluting substances may enter the environment, such as "spilling, leaking . . . escaping . . . leaching, dumping or disposing."

42 U.S.C. § 9601(22) (1994). "Hazardous substance" is defined as any substance designated as hazardous under CERCLA or any of four other environmental statutes. 42 U.S.C. § 9601(14). This definition "covers a vast array" of substances, including over 700 hazardous substances listed pursuant to CERCLA alone. *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1200 (2d Cir. 1992). "Facility" is defined to include not only a long list of specific types of structures or equipment such as buildings, pipelines, wells, pits, and storage containers, but also to include "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed or otherwise come to be located." 42 U.S.C. § 9601(9) (1994).

Likewise, CERCLA identifies a wide range of persons who are liable for cleanup costs, including facility owners and operators, those who arranged for disposal of hazardous substances, and transporters of hazardous substances to the facility. 42 U.S.C. § 9607(a)(1)-(4) (1994). The class of liable persons includes all present owners and operators of the facility where the release occurred, and all who owned or operated the facility at the time of disposal of a hazardous substance. 42 U.S.C. § 9607(a)(1) and (2) (1994). These examples show that Congress intended to cast a very wide net of liability by broadly defining the key terms used in CERCLA's liability provisions. The meaning of the term "operator" must be considered in this context as another key term in the broadly defined CERCLA statutory liability system.

However, the meaning of "operator" under CERCLA is not as easy to determine as most of the key terms used

in CERCLA. CERCLA does not define the term "operator," but rather defines the term "owner or operator." That definition provides in pertinent part as follows:

> The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person, owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or *otherwise controlled activities at such facilities immediately beforehand*. Such term does not include a person, who, without *participating in the management of a vessel or facility*, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

42 U.S.C. § 9601(20)(A) (1994) (emphasis added).

This largely circular definition of "owner or operator" offers important, but limited, guidance in determining what the term "operator" means. For example, with respect to certain facilities that have reverted to state or local control, "owner or operator" is defined as the immediately prior owner or operator, including one who "otherwise controlled activities at such facilities immediately beforehand." This language implies that control of activities at a facility is a sufficient basis to determine that a person is an owner or operator. Similarly, in excluding certain holders of secured interests from the definition of "owner or operator," CERCLA limits the exclusion to

those who hold such indicia of ownership "without participating in the management of a . . . facility." Thus, by implication, participating in management is a factor in determining a person's status as "owner or operator." *See New York v. Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985).

The most recent amendments to the CERCLA definition of "owner or operator" offer some further assistance in construing the term "operator." Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 2502(b), 110 Stat. 3009-464 to 3009-467 (1996), to be codified at 42 U.S.C. § 9601(20)(E)-(G). Similar to the pre-existing secured interest holder exclusion, these amendments exclude from liability a "lender, that *without participating in management* of a vessel or facility, holds indicia of ownership primarily to protect the [lender's] security interest. . . . " *Id.*, 110 Stat. 3009-464, to be codified at 42 U.S.C. § 9601(20)(E)(i) (emphasis added). The amendments go on to describe several levels of activity that will be considered participation in management by a lender. *Id.*, 110 Stat. 3009-465 to 3009-467, to be codified at 42 U.S.C. § 9601(20)(F)-(G). These activities range from the exercise of narrow authority to control specific environmental compliance matters related to a facility, to the exercise of more general authority to "control at a level comparable to that of a manager . . . such that the person has assumed or manifested responsibility . . . over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the . . . facility other than the function of environmental compliance." *Id.*, 110 Stat. 3009-465, to be codified at 42 U.S.C. § 9601(20)(F)(ii). The term "operational function"

is further defined to include "a function such as that of a facility or plant manager, operations manager, chief operating officer, or chief executive officer." *Id.*, 110 Stat. 3009-467, to be codified at 42 U.S.C. § 9601(20)(G)(v).

While these lender liability provisions apply only in the unique context of a lender who may come to possess and operate a facility of a debtor by exercise of its rights as a creditor on a defaulted loan, the language is instructive about what operational activities are sufficient to negate a lender's exclusion from CERCLA liability. A lender will lose its liability exclusion and become liable as an "owner or operator" if its actions are like those of an operations manager or chief executive officer of the debtor, even if those actions do not include management of environmental compliance or practices. The clear implication of this language is that those who actually manage or control the operations of the entity or business where a release occurs are liable for cleanup costs under CERCLA.

Thus, while the CERCLA definition of "owner or operator" provides important clues to the meaning of the term "operator," it lacks any express language from which to determine the meaning of the term. For this reason, the Court should look to the "ordinary and natural" meaning or use of the word "operator" when construing this term in CERCLA. *See Bailey v. United States*, ___ U.S. ___, 116 S. Ct. 501, 506-507 (1995) (using ordinary and natural meaning in construing a statute criminalizing the use of a firearm related to a drug trafficking offense). Ordinarily, "to operate" means "to conduct the affairs of;

manage; *operate a business.*" American Heritage Dictionary of English Language, 1268 (3d ed. 1992) (emphasis in original).

Hence, in the ordinary meaning of the term, an "operator" is a person who manages or conducts the affairs of a business or other entity. This broad definition is consistent with what can be learned by implication from the CERCLA definition of "owner or operator," including the recent lender liability amendments. It is also consistent with the statutory context in which key terms of the CERCLA liability provisions are broadly defined.

Therefore, as used in CERCLA, "operator" should include any person that manages or actively participates in the operational affairs of a business or other entity whose facility is the source of a release or threatened release. Nothing in CERCLA precludes the application of this definition of "operator" to any person whose actions meet the statutory test. Thus, nothing in CERCLA excludes a corporation from liability as an operator because it is a parent corporation to a subsidiary where the release occurred. *See United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991) ("Our analysis of the statute and its legislative purpose and history reveals no reason why a parent corporation cannot be held liable as an operator under CERCLA"). All that CERCLA requires is a factual showing that the parent corporation actually controlled or managed the operations of the subsidiary. Operator liability is solely a matter of the construction and application of CERCLA, and does not require a court to apply

any other law, including the common law of corporate veil-piercing, to impose liability.

B. The Interpretation Of "Operator" Urged By Amici States Is Supported By The Policies And Purposes Of CERCLA.

Construing the term "operator" to include those who actually manage or control the affairs of the entity whose facility is the source of a release, and imposing cleanup cost liability on a parent corporation whose actions meet this test, is further supported by the statutory design and purposes of CERCLA. This Court has recognized that consideration of statutory policies and purposes is appropriate when determining the proper scope of a statute. *Rose v. Lundy*, 455 U.S. 509, 517 (1982) (construing federal statute requiring dismissal of certain habeas corpus writs by federal district courts). In this case, where the interpretation urged by Amici States is solidly grounded in the text and structure of CERCLA, additional consideration of the underlying policies of CERCLA is appropriate to further confirm the correctness of this interpretation.

This Court has recognized that "CERCLA both provides a mechanism for cleaning up hazardous-waste sites . . . and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) (citing 42 U.S.C. §§ 9604, 9606; holding that CERCLA abrogated states' 11th Amendment immunity), overruled by *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 116 S. Ct. 1114 (1996). Since the earliest cases involving judicial construction of CERCLA, federal

courts have cited two specific purposes of the statute – to foster prompt and effective cleanup and to impose cleanup costs on those responsible for the release – as a basis for expansive construction of the statute, including its liability provisions. *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (citing *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100 (D. Minn. 1982)). Similarly, the Second Circuit, in imposing corporate parent liability under CERCLA as urged by Amici States in this case, cited in support of its holding the congressional purpose of CERCLA to ensure "that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." *Schiavone v. Pearce*, 79 F.3d 248, 253 (2d Cir. 1996) (quoting S. Rep. No. 848, 96th Cong., 2d Sess. 13 (1980)). *See also, John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 405 (1st Cir. 1993); *Lansford-Coaldale Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993); and *B.F. Goodrich Co. v. Murtha*, 958 F.2d at 1198 ("Congress envisioned that EPA's costs would be recouped, the Superfund preserved, and the taxpayers not required to shoulder the burden of a nation-wide cleanup.").

A broad interpretation of "operator" liability under CERCLA, which holds a parent corporation liable for its own acts as an operator, clearly advances CERCLA's statutory purpose of placing the burden of cleanup costs on those connected to the release rather than publicly-funded cleanup programs supported by state or federal taxpayers. Given the solid support for this interpretation of operator liability in the text and structure of CERCLA, its effect in advancing the key policies of the statute

further confirms and strengthens the correctness of the interpretation.

C. The Remedial Purpose Of CERCLA Gives Further Support To An Expansive Interpretation Of CERCLA's Liability Provisions.

The interpretation of CERCLA urged by Amici States finds further support in the clearly remedial nature and purpose of CERCLA. CERCLA has frequently been cited by federal courts as a remedial statute which should be broadly construed. Several of the courts of appeals which have adopted the rule of corporate parent liability urged by Amici States have cited the remedial nature of CERCLA in support of their construction of the statute. *Kayser-Roth*, 910 F.2d at 26 ("Because CERCLA is a remedial statute, we . . . construe its provisions liberally to avoid frustration of the beneficial legislative purpose." (citation omitted)); *Schiavone*, 79 F.3d at 253 ("An interpretation of CERCLA that imposes operator liability directly on parent corporations whose own acts violate the statute is consistent with the general thrust and purpose of the legislation."); *see also, Dedham Water Co.*, 805 F.2d at 1081 ("CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment."). Indeed, the courts that have construed CERCLA have consistently acknowledged the remedial nature of the statute, and have done so more frequently in CERCLA cases than in cases involving other environmental statutes. *See*, Blake A. Watson, *Liberal Construction of CERCLA under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 Harv. Envtl. L. Rev. 199, 262 nn.269-70 (1996) (The

author answers the question posed in the title by concluding that it is appropriate for courts to aggressively interpret CERCLA to effectuate its remedial goals.).

Amici States believe that CERCLA should be construed expansively as a remedial statute for two reasons. First, CERCLA focuses on the abatement of long-standing environmental and public health threats posed by historical releases of hazardous substances. Second, CERCLA embodies a unique liability approach which builds upon pre-existing common law legal remedies, such as nuisance and other strict liability principles, to create powerful new remedies that place the burden of cleanup on responsible persons. *See* Report of the Committee on Environment and Public Works on S. 1480, S. Rep. No. 848, 96th Cong., 2d Sess. 12-15 (1980). Thus, CERCLA is an eminently appropriate statute for application of the well-recognized canon of statutory construction that remedial statutes should be given a broad or expansive construction to further their remedial purposes. *See, Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (construing the Security and Exchange Act of 1932, and recognizing the "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.") *See also, Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1 (1976).

The application of the remedial purpose canon in construing the term "operator" and determining the scope of operator liability under CERCLA reinforces and confirms the correctness of the parent liability rule urged by Amici States, which is already firmly supported by the text and structure of the statute, and serves to advance CERCLA's underlying statutory purposes.

D. The Court Should Adopt The Parent Corporation Liability Rule Under CERCLA Adopted By The Majority Of The Courts Of Appeals Deciding This Issue.

Of the seven courts of appeal that have considered this specific issue, four have interpreted CERCLA to impose operator liability on parent corporations that actively participate in management or exercise actual control of their subsidiaries. *United States v. Kayser-Roth Corp.*, 910 F.2d 24 (1st Cir. 1990); *Schiavone v. Pearce*, 79 F.3d 248 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107 (11th Cir. 1993). One has imposed operator liability on a parent corporation based on authority to control, rather than actual control, of the subsidiary's operations. *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992), *cert. denied*, 506 U.S. 940 (1992). Only one court of appeals other than the Sixth Circuit has held that a parent corporation is not liable under CERCLA for a release from a subsidiary's facility unless the corporate veil can be pierced under common law principles. *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990). The *Joslyn* case, however, is distinguishable from the Sixth Circuit decision here because, in *Joslyn*, there was little, if any, evidence that the parent corporation had actually participated by its own acts in managing the operations of the subsidiary. Instead, the question centered on the parent corporation's derivative liability for acts of its subsidiary, based on the parent's financial and administrative control rather than operational control of the subsidiary. That is not the issue in this case, where the question is whether a parent corporation can be held directly liable as an operator

under CERCLA because of its own acts involving management and operational control of its subsidiary.

The Amici States urge the Court to adopt the rule followed by the majority of the courts of appeals that have decided the question, by holding that a parent corporation is liable as an operator under CERCLA when the parent corporation actually controls or actively participates in the management of its subsidiary. The specifics of what constitute actual control or active participation in management is generally a "fact-intensive inquiry" and should be left for the district courts to decide on the facts of each case.

CONCLUSION

For the reasons stated above, the judgment of the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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